IHM Sdn Bhd v AIZ Information Services (M) Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D3–22–2696 OF 1999
ZULKEFLI J
17 JUNE 2003

Civil Procedure *— Stay of proceedings — Arbitration — Discretion of court — Whether defendant had taken a step in proceedings — Whether appeal would be rendered nugatory — Arbitration Act 1952 s 6*

This was the defendant's application for a stay of execution of the order of the court (encl 20) which allowed the plaintiff's appeal against the decision of the senior assistant registrar allowing the defendant's application for a stay pending arbitration. The defendant's application for stay was based on two substantive grounds. The issues for the determination of the court were: (i) whether the defendant had taken a step in the proceedings by virtue of s 6 of the Arbitration Act 1952 ('the Act'); and (ii) whether the appeal would be rendered nugatory if the appeal in the Court of Appeal was allowed and there would be no stay of proceedings in the High Court.

Held, dismissing the defendant's application with costs:

(1) Section 6 of the Act states that a party will lose his right to arbitration only if he takes a step in the proceedings before filing an application to stay proceedings and to refer the matter to arbitration. In this case, the defendant had already complied with s 6 of the Act by filing an application before taking any further steps in these proceedings. Therefore, the issue of the defendant being guilty of taking a step in the proceedings did not arise at all (see p 249G–H).

(2) Fraud had been pleaded as the plaintiff's cause of action. This was a case where the appeal was obviously lacking in merit. It should not be a proper exercise of the High Court's discretion to grant a stay as it would cause an unwarranted delay of the hearing and injustice to the plaintiff. The suit would be delayed further as there was no indication when the defendant's appeal would be heard by the Court of Appeal and if it was unsuccessful, an inordinate amount of time had been wasted which could be used to dispose of the plaintiff's claim judiciously (see pp 250F–251A).

[Bahasa Malaysia summary

Ini adalah permohonan defendan untuk satu penggantungan perlaksanaan perintah mahkamah yang membenarkan rayuan plaintiff terhadap keputusan penolong kanan pendaftar yang membenarkan permohonan defendan untuk satu penggantungan sementara menunggu timbangtara. Permohonan defendan untuk

penggantungan berdasarkan dua alasan substantif. Persoalan-persoalan untuk ditentukan oleh mahkamah adalah: (i) sama ada defendan telah mengambil langkah dalam prosiding menurut s 6 Akta Timbangtara 1952 ('Akta tersebut'); dan (ii) sama ada rayuan tersebut dianggap tidak berguna jika rayuan di Mahkamah Rayuan dibenarkan dan tiada penggantung prosiding di Mahkamah Tinggi.

Diputuskan, menolak permohonan defendan dengan kos:

(1) Seksyen 6 Akta tersebut menyatakan bahawa satu pihak akan hilang hak beliau untuk merujuk kepada timbangtara hanya jika beliau mengambil langkah dalam prosiding sebelum pemfailan satu permohonan untuk menggantungkan prosiding dan untuk merujuk perkara tersebut ke timbangtara. Dalam kes ini, defendan telahpun mematuhi s 6 Akta tersebut dengan memfailkan satu permohonan sebelum mengambil apa-apa langkah selanjutnya dalam prosiding tersebut. Oleh itu, persoalan defendan bersalah kerana mengambil satu langkah dalam prosiding tidak timbul langsung (lihat ms 249G–H).

(2) Fraud telah diplidkan sebagai kausa tindakan plaintif. Ini merupakan satu kes di mana terdapat kekurangan merit pada rayuan. Ia tidak sepatutnya merupakan satu pelaksanaan betul budi bicara Mahkamah Tinggi untuk membenarkan satu penggantungan kerana ia akan menyebabkan kelewatan perbicaraan yang tidak diwarankan dan ketidakadilan terhadap plaintif. Guaman tersebut akan tertangguh lagi kerana tiada tanda rayuan defendan akan didengar oleh Mahkamah Rayuan dan jika tidak berjaya, banyak masa telah terbuang yang boleh digunakan untuk menyelesaikan tuntutan plaintif dengan adil (lihat ms 250F–251A).]

Notes

For cases on arbitration, stay of proceedings, see 2(3) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 5514–5522.

Cases referred to

See Teow Guan & Ors v Kian Joo Holdings Sdn Bhd & Ors [1995] 3 MLJ 598

Legislation referred to

Arbitration Act 1952 s 6
Rules of the High Court 1980

Lee Min Choon (*Kenny Teh* with him) (*Majid & Chen*) for the plaintiff.
Sanjay Mohan (*Lee Hishammuddin*) for the defendant.

Zulkefli J: This is the defendant's application for a stay of execution of the order of this court dated 2 December 2002 (encl 20). The relevant facts leading to this application being filed on behalf of the defendant are as follows:

(1) The plaintiff filed a writ and statement of claim against the defendant.

(2) The defendant filed a conditional appearance and thereafter applied for a stay pending arbitration pursuant to s 6 of the Arbitration Act 1952 ('the Act').

(3) The senior assistant registrar ('the SAR') who heard the application in the first instance allowed the defendant's application. The plaintiff appealed against the said decision.

(4) On 2 December 2002, this court allowed the plaintiff's appeal and ordered the parties to comply with the necessary requirements to set the matter down for trial. The defendant has filed an appeal against that said decision to the Court of Appeal. The defendant is currently awaiting a hearing date of the said appeal.

(5) The defendant upon filing the appeal filed this application for a stay of execution of the order of the court dated 2 December 2002.

It is noted that the defendant's application for a stay is based on two substantive grounds. The first ground is that if the defendant complies with the necessary requirements to set this matter down for trial, the plaintiff may at the hearing of the appeal, allege that the defendant has taken a step in the proceedings. Accordingly, the defendant is precluded from filing and seeking a stay of proceedings and referring the dispute to arbitration. The second ground is that the defendant contends if the appeal in the Court of Appeal is allowed and there is no stay of proceedings in the High Court then the appeal would be rendered nugatory.

DECISION OF THE COURT

Taking a step in the proceedings

As regard the first ground raised by the defendant, I am of the view that this is a misinterpretation of s 6 of the Act. Section 6 of the Act states that a party will lose his right to arbitration only if he takes a step in the proceedings before filing an application to stay proceedings and to refer the matter to arbitration. In this case, the defendant has already complied with s 6 of the Act by filing an application before taking any further step in these proceedings. Therefore, the issue of the defendant being guilty of taking a step in the proceedings does not arise at all.

Appeal rendered nugatory

As regards the second ground relied on by the defendant, the onus is on the defendant to prove that their appeal would be rendered nugatory without the grant of a stay of execution (see the case of *See Teow Guan & Ors v Kian Joo Holdings Sdn Bhd & Ors* [1995] 3 MLJ 598). The learned counsel for

the defendant in his submission does not state how or in what manner the defendant's appeal would be rendered nugatory. A bare assertion is insufficient. The defendant must show in the affidavit supporting its application evidence of the prejudice that will be suffered if a stay of execution is not granted. Looking at the factual circumstances of this case, it is my finding that in fact no harm or prejudice will be caused to the defendant if a stay of execution is not granted. To appreciate this fact, we must ask what is the nature of the order of the court dated 2 December 2002 ('the said order') that the defendant desires to have it stayed. The SAR ordered a stay of proceedings so that the plaintiff s claim can be referred to arbitration. This court allowed the appeal of the plaintiff against the SAR's order. Effectively, this meant that the parties are now required by the Rules of the High Court 1980 ('the RHC') to comply with the requirements of pleadings and procedure in relation to trial proceedings. The said order did not direct the doing or non-doing of any act. It merely removed an order suspending the application of the RHC on the parties. If a stay of execution is not granted, it would mean that the defendant is required to file a defence to this action and to comply with the provisions of the RHC. If the defendant succeeds in its appeal, these proceedings will be stayed and everything done by the defendant in this action will be nullified and of no effect. Thus, no harm will be caused to the defendant by reason of having filed a defence to this action. Whatever defence that would be filed by the defendant would be relied on by them anyway in the event that the defendant is allowed to have this claim tried by an arbitrator.

Further, I find that the success of the defendant's appeal depends on whether fraud is pleaded by the plaintiff in a manner that would deprive the arbitrator of jurisdiction. This issue is determined by looking at the statement of claim and affidavits already filed herein. The filing of a defence will not diminish or increase the merit of the defendant's appeal before the Court of Appeal. At the hearing of the plaintiff's appeal against the SAR's decision of a stay of proceedings pending arbitration, I have ruled that the plaintiff has a claim which rightly deserves to be heard by this court. The authorities are very clear that if fraud is pleaded then an arbitrator has no jurisdiction to hear the matter. It is my finding from the pleadings that fraud has been pleaded as the plaintiff's cause of action. This is a case where the appeal is obviously lacking in merit and it would not be a proper exercise of this court's discretion to grant a stay.

Last but not least, I must state here that the defendant has delayed the prosecution of this suit for more than four years with an application to stay proceedings. Even though they have already failed to obtain a stay of proceedings, they are now delaying this suit further by this application for a stay of execution. Indeed, if there is any prejudice, it is suffered by the plaintiff by their inability to have this suit prosecuted with the normal despatch under the provisions of the RHC. To permit a stay would cause an unwarranted delay of the hearing of this case which would cause injustice to the plaintiff. This suit has not proceeded beyond filing of the statement of claim. If the defendant obtains the order they seek, it means this suit will be delayed further. There is no indication when the defendant's appeal will

A be heard by the Court of Appeal. If it is unsuccessful, it will mean that an inordinate amount of time has been wasted which could be used to dispose of the plaintiff's claim judiciously.

For the reasons above stated, I hereby dismissed the defendants application with costs.

B *Defendants application dismissed with costs.*

Reported by Ezatul Zuria Azhari

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